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The ADA Amendments Act of 2008: Why the Qualified Individual Analysis Is the New Battleground for Employment Discrimination Suits

I. Introduction

It is a well-accepted principle in our modern society that individuals should not suffer discrimination in the workplace on account of their disabilities. Congress sought to support this ideal by passing the Americans with Disabilities Act of 1990 (ADA).¹ After the Supreme Court handed down narrowing constructions of what constitutes a “disability” near the turn of the twenty-first century,² Congress breathed new life into the ADA through enacting the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act).³ Now, nearly five years after the Amendments Act first became effective on January 1, 2009,⁴ concrete patterns have finally emerged from federal court opinions interpreting its major changes. These results provide an exciting look at the Amendments Act’s effect and a glimpse of its future implications in the employment context.

The most astonishing consequence of the Amendments Act is its expansion of the definition of a disability. Because a plaintiff must prove that she is disabled as an element of her *prima facie* claim,⁵ such an

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2012)).

2. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, § 2(b)(2)-(3), 122 Stat. at 3554.

3. 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 (2012)). Some scholars refer to this Amendment as the “ADAAA.” See, e.g., Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1564 (2014). Although there is no substantive difference between these different monikers, this Comment primarily uses the phrase “Amendments Act” for its perceived ease of reading.

4. § 8, 122 Stat. at 3559. Though the Amendments Act became effective January 1, 2009, most federal courts of appeals agree that it does not apply retroactively and, therefore, applies only to discriminatory conduct occurring on or after January 1, 2009. See *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 F. App’x 472, 478 n.14 (4th Cir. 2010); *Becerril v. Pima Cnty. Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 34 n.3 (1st Cir. 2009); *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 565-67 (6th Cir. 2009); *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009).

5. See *McDaniel v. Piedmont Indep. Sch. Dist. No. 22*, No. CIV-11-373-M, 2012 WL 1227154, at *3 (W.D. Okla. Apr. 11, 2012) (citing *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1037-38 (10th Cir. 2011)).

expansion reflects a major change in all disability discrimination suits. In response to the congressional indication that the initial determination of whether an employee is disabled “should not demand extensive analysis,”⁶ courts applying the Amendments Act almost always find that an employee’s impairment “substantially limits one or more [of her] major life activities.”⁷ In fact, as a result of the Amendments Act, courts often assume the presence of a disability when there is a close call on whether the employee’s impairment substantially limits a major life activity.⁸ This failure to provide an individualized assessment of the limiting nature of a person’s impairment undermines the importance of the threshold question under the original ADA: whether the employee is disabled.⁹

Ultimately, this Comment addresses the overexpansion of the definition of a disability and shows how the determination of whether an employee is a qualified individual under the ADA has become the major battleground in disability discrimination suits. Part II outlines the basic statutes and regulations that govern employment discrimination suits brought under the ADA. Part III shows that the qualified individual analysis has become the key inquiry in disability discrimination suits and explores the practical effects of this change on employment practices. To illustrate the Amendments Act in action, Part III also uses an empirical study to illustrate that plaintiffs’ chances of surviving summary judgment are much higher under the Amendments Act than under the original ADA. Part IV contends that the Amendments Act has gone too far in expanding who qualifies as disabled under the ADA, explores the interpretational problems that have arisen under the Amendments Act, and offers suggestions for the Equal Employment Opportunity Commission (EEOC) to resolve these problems where possible. Finally, Part V considers what precedential value survives from pre-Amendments Act case law in light of the significant reform brought about by the Amendments Act.

6. ADA Amendments Act of 2008, § 2(b)(5), 122 Stat. at 3554.

7. 42 U.S.C. § 12102(1)(A) (2012).

8. *See infra* notes 140-141 and accompanying text.

9. *See, e.g.,* Ivey v. First Quality Retail Serv., 490 F. App’x 281, 285 (11th Cir. 2012); *see also* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j)(3) (2014).

II. Disability Discrimination Framework Provided by Congress and the EEOC

Employers and practitioners are often plagued by their misunderstanding of the major employment revisions in Title I of the Amendments Act.¹⁰ In order to understand what employers' responsibilities are under the Act, one must first appreciate the basic structure of the ADA and the hierarchy of authority that Congress established under it. The principal provision of the ADA forbids an employer from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."¹¹ An employer will also be liable for failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer can establish that the accommodation "would impose an undue hardship on the operation of the business."¹²

Under either avenue of liability, the ADA instructs that a court's determination of whether a person is disabled under the ADA requires an "individualized assessment"—not a presumption.¹³ In order to establish a *prima facie* claim, "a plaintiff must demonstrate that she (1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer on the basis of that disability."¹⁴

A. Statutory Definition of a "Disability"

There are three types of disabilities under the ADA, and a plaintiff can proceed under any one or combination of them.¹⁵ Under the ADA, a person

10. *See, e.g.*, *Saley v. Caney Fork, LLC*, 886 F. Supp. 2d 837, 849-52 (M.D. Tenn. 2012) (where the employer suffered from a basic misunderstanding of the changes to the "regarded as" prong made by the Amendments Act). Although a substantial portion of the ADA was directed at public services (Title II) and public accommodations (Title III), this Comment focuses on disability law in the employment context under Title I of the ADA, which is codified at 42 U.S.C. §§ 12111-12117 (2012).

11. 42 U.S.C. § 12112(a).

12. *Id.* § 12112(b)(5)(A).

13. 29 C.F.R. § 1630.2(j)(1)(iv) (2014).

14. *McDaniel v. Piedmont Indep. Sch. Dist.* No. 22, No. CIV-11-373-M, 2012 WL 1227154, at *3 (W.D. Okla. Apr. 11, 2012) (depicting a common formulation of the *prima facie* claim based on 42 U.S.C. § 12112(a)).

15. 29 C.F.R. § 1630.2(g)(2).

is disabled if he (1) has a “physical or mental impairment that substantially limits one or more major life activities”; (2) has “a record of such an impairment”; or (3) is “regarded as having such an impairment (as described in paragraph (3)).”¹⁶ Paragraph 3, which was not introduced until the passage of the Amendments Act, explains that a person claiming that she has been “regarded as” disabled must only prove that an employer discriminated against her “because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*.”¹⁷

Although Congress did not define “major life activities” within the Amendments Act, it created a nonexhaustive list of major life activities, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹⁸ According to the Amendments Act, major life activities also encompass the operation of major bodily functions, including the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹⁹ The Amendments Act’s inclusion of major bodily functions as “major life activities” is a brand new component of the ADA analysis and was intended to provide coverage for chronic impairments that can be substantially limiting.²⁰

16. 42 U.S.C. § 12102(1)(A)-(C). These are commonly referred to, respectively, as the “actual disability” prong, the “record of” prong, and the “regarded as” prong. 29 C.F.R. § 1630.2(g)(2).

17. 42 U.S.C. § 12102(3)(A) (emphasis added). Although a plaintiff no longer must prove that the employer perceives her impairment as limiting a major life activity, there is at least a temporal limitation on plaintiffs proceeding under the “regarded as” prong. Those bringing claims under this prong cannot succeed if the impairment is both transitory and minor. *Id.* § 12102(3)(B) (explaining that a transitory impairment is one “with an actual or expected duration of 6 months or less”). EEOC regulations reinforce that an employee can still succeed under the “regarded as” prong even if his perceived impairment is transitory or minor, so long as it is not both. 29 C.F.R. § 1630.2(g)(1)(iii). Thus, an individual perceived to suffer from an extremely minor impairment could typically survive the summary judgment stage, so long as her impairment lasts longer than six months. *See id.*; Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(l) (2014).

18. 42 U.S.C. § 12102(2)(A).

19. *Id.* § 12102(2)(B).

20. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(i) (2014) (listing HIV infection and cirrhosis of the liver caused by Hepatitis B as chronic impairments that affect major bodily functions).

The ADA (revised by the Amendments Act) provides the basic framework for determining whether someone is disabled. The principal command of the Amendments Act is that the definition of disability should be construed “in favor of broad coverage of individuals,” and “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”²¹ Furthermore, an impairment need only substantially limit one major life activity,²² and “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”²³ Lastly, in rejecting the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*,²⁴ Congress explained that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures,”²⁵ except for the “mitigating measures of ordinary eyeglasses or contact lenses.”²⁶ Thus, under the Amendments Act’s changes, the disability determination must be made in the broadest sense possible—both the concept of a “major life activity” and the circumstances where an individual’s impairment “substantially limits” a major life activity have been dramatically expanded.

B. EEOC Regulations and Interpretive Guidance

Congress entrusted a great deal of the ultimate decision-making power to the EEOC by granting it authority “to issue regulations implementing the definition[] of disability in Section 12102 of [the ADA].”²⁷ Accordingly, the EEOC dedicated a substantial portion of its ADA regulations to defining what “substantially limits” a major life activity.²⁸ The EEOC divided most of its guidance into two distinct parts: (1) specific regulations

21. 42 U.S.C. § 12102(4)(A)-(B).

22. *Id.* § 12102(4)(C).

23. *Id.* § 12102(4)(D).

24. 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(3), 122 Stat. 3553, 3554.

25. 42 U.S.C. § 12102(4)(E)(i) (2012).

26. *Id.* § 12102(4)(E)(ii).

27. *Id.* § 12205a. Although Congress also granted the authority to issue regulations to the Attorney General and the Secretary of Transportation, the EEOC regulations are the most comprehensive set of guidelines and are tailored exclusively for disability discrimination suits brought under Title I of the ADA. *See* 29 C.F.R. § 1630.2(b) (2012) (stating that covered entities under the EEOC regulations are employers, employment agencies, labor organizations, or joint labor management committees).

28. *Id.* § 1630.2(j)(1)-(5) (outlining what impairments will almost always substantially limit a major life activity).

that mirror and further elaborate upon the statutes implementing the Amendments Act,²⁹ and (2) the Interpretive Guidance appended after the regulations.³⁰

The starting point for the disability analysis is determining what constitutes an impairment—only then can a court decide whether that impairment substantially limits a major life activity. EEOC regulations define a physical or mental impairment as “(1) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, . . . or (2) [a]ny mental or psychological disorder, such as an intellectual disability . . . , organic brain syndrome, emotional or mental illness, and specific learning disabilities.”³¹

EEOC regulations elaborate upon the disability analysis in several ways. For example, the EEOC has added several major life activities and major bodily functions to the nonexhaustive lists created by the Amendments Act.³² In addition, the EEOC resolved a circuit split by concluding that employers are not required to provide accommodations to employees who claim a disability “solely under the ‘regarded as’ prong.”³³ Furthermore, the regulations include fairly substantial coverage of the “regarded as” prong to supplement the Amendments Act’s revision of this prong.³⁴

EEOC regulations promulgated soon after the original ADA was passed also clarify the second prong of the plaintiff’s *prima facie* claim, adding a second element that a plaintiff must meet in order to be deemed a “qualified

29. *Id.* §§ 1630.1-1630.16.

30. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. (2014).

31. 29 C.F.R. § 1630.2(h).

32. *Id.* § 1630.2(i)(1)(i) (adding sitting, reaching, and interacting with others to the list of major life activities); *id.* § 1630.2(i)(1)(ii) (adding special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions to the list of major bodily functions).

33. *Id.* § 1630.9(e). Before the adoption of the Amendments Act, the federal circuits were split regarding whether employees claiming that they were regarded as disabled deserved reasonable accommodations. *See* *Ryan v. Columbus Reg’l Healthcare Sys., Inc.*, No. 7:10–CV–234–BR, 2012 WL 1230234, at *5 (E.D.N.C. Apr. 12, 2012). *Compare* *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003) (concluding that there is no duty to accommodate an individual who is regarded as having a disability), *and* *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999) (same), *with* *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 675–76 (10th Cir. 2005) (concluding that there is a duty to accommodate an individual who is regarded as having a disability), *and* *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 772–76 (3d Cir. 2004) (same).

34. 29 C.F.R. §§ 1630.2(g)(3), (j)(2), (l).

individual” with a disability.³⁵ In addition to being capable of performing the essential functions of the position, with or without reasonable accommodation, the EEOC also instructs that an employee must possess “the requisite skill, experience, education and other job-related requirements of the employment position” she holds or desires.³⁶

The Interpretive Guidance contains analysis found in neither the Amendments Act nor the EEOC regulations. For example, the Interpretive Guidance is now the only place that explains when an individual is substantially limited in the major life activity of working, even though that discussion was included in the regulations prior to the Amendments Act.³⁷ The EEOC removed this discussion from the regulations because, in light of the expanded list of major life activities, the EEOC concluded plaintiffs would need to rely on using the major life activity of working “in only very targeted situations.”³⁸ Additionally, the Interpretive Guidance provides the reasoning behind the various decisions made by the EEOC and makes several references to the goals articulated by Congress in the legislative history of the Amendments Act.³⁹ Because the Interpretive Guidance contains the most thorough analysis of the recent changes to the ADA, practitioners and employers must reference it to thoroughly grasp all of the applicable rules under the Amendments Act. Of course, now that the Amendments Act and accompanying regulations have become effective in most new cases, the force of the new statutes, regulations, and Interpretive Guidance is slowly playing itself out in court.

III. The Departure from Disability Analysis and Shift in Focus to Job Qualifications

While plaintiffs fare much better under the Amendments Act in proving that they are disabled, recent case law suggests that courts are nonetheless more frequently granting summary judgment to employers because plaintiff-employees are not “qualified individuals” within the meaning of the ADA.⁴⁰ This result could be attributable to the fact that although Congress significantly expanded the definition of disability under the Amendments Act, the second and third elements of an employee’s prima

35. 29 C.F.R. § 1630.2(m) (2014).

36. *Id.*

37. 29 C.F.R. pt. 1630 app. § 1630.2(i) (2014).

38. *Id.* § 1630.2(j)(5) and (6).

39. *See, e.g., id.* § 1630.2(j)(1).

40. *See infra* Part III.A.1-2.

facie claim have remained largely untouched.⁴¹ As alluded to previously, the plaintiff still bears the ultimate burden of demonstrating all three prima facie elements.⁴²

Due to the increased importance of the qualified individual analysis, written job descriptions now play a vital role in a court's determination of whether an employee can adequately perform his job in spite of having a disability. This shift in focus that Congress spurred will force employers to update their written job descriptions to reflect the key expectations of their employees. But has Congress also created a perverse incentive for employers to screen out potentially disabled individuals in the hiring process?

A. Developments in the Case Law Interpreting the Amendments Act

There has been an outpouring of scholarly literature predicting how the Amendments Act would affect ADA discrimination suits.⁴³ Only recently, though, have opinions interpreting the Amendments Act materialized in case law.⁴⁴ Analyzing some of these cases will illustrate the trends developing in the aftermath of the Amendments Act. In order to portray these developments, I gathered statistics for the success rate of ADA plaintiffs at the summary judgment phase of employment discrimination

41. As noted above, the plaintiff has the burden of proving he (1) has a disability; (2) is a qualified individual; and (3) suffered discrimination on the basis of his disability. *McDaniel v. Piedmont Indep. Sch. Dist.* No. 22, No. CIV-11-373-M, 2012 WL 1227154, at *3 (W.D. Okla. Apr. 11, 2012). One minor alteration must be noted. The Amendments Act changed the third prima facie element so that it now prohibits "employers from making employment-related decisions 'on the basis of' (as opposed to 'because of') an employee's disability." *Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at *4 (S.D. Ind. Jan. 9, 2013). *Nayak* found that this small revision does not transform the ADA's but-for causation requirement into a mixed-motive statute, meaning the rule that an employer will only be liable for discrimination under the "regarded as" prong where he would not have terminated the employee but for the employee's disability remains after the Amendments Act. *Id.* at *3-*4. Judging from this decision, the alteration of the third prima facie element will likely have little or no effect on ADA discrimination suits.

42. *See Lloyd v. Hous. Auth. of Montgomery, Ala.*, 857 F. Supp. 2d 1252, 1262 (M.D. Ala. 2012).

43. *See, e.g.,* Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366-69 (2010); Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 669-70 (2010).

44. Because the Amendments Act does not apply retroactively, only discriminatory actions occurring after January 1, 2009, are scrutinized under the Amendment's changes to the ADA. *See supra* note 4.

suits from January 1, 2012 through January 15, 2013 (the Amendments Act study) and compared them to statistics gathered in a similar pre-Amendments Act study (the Berger study) for the years 2000 and 2001.⁴⁵ Comparing these studies reveals that since the Amendments Act became effective, federal courts have granted summary judgment to employers with a noticeably declining frequency. More surprisingly, the Amendments Act has also affected the bases for courts' decisions in ways that might not have been anticipated by most legal commentators.

A court's ruling on a summary judgment motion—rather than the results of a trial or motion to dismiss—represents the superior benchmark for measuring the impact of the changes in the ADA. The Amendments Act has not been in place long enough for an appreciable number of ADA discrimination suits to proceed to trial.⁴⁶ Thus, the time is not yet ripe to see if the Amendments Act will enable employees to improve upon their historically low win percentages in ADA discrimination trials.⁴⁷ The Rule 12(b)(6) dismissal stage is also an inappropriate benchmark because courts often grant dismissal for reasons unrelated to the merits of an employee's disability discrimination claim, especially when pro se plaintiffs are involved.⁴⁸

45. Vivian Berger, Michael O. Finkelstein, & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 50-65 (2005).

46. Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 307 (2005) (finding that, on average, ADA claims are resolved fourteen months after the plaintiff files a claim).

47. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (“[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level.”); see also Amy L. Allbright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 339-40 (2010) (finding that employers won in 97.4% of ADA discrimination suits in 2009, where the study counted an employer “win” as either a victory after trial or the dismissal of an employee’s claim before trial). But see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 445 tbl. 2 (2004) (showing that from 1998 to 2001 employees prevailed 41.27% of the time in ADA jury trials).

48. Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 908 (1997) (“[M]any cases have been poorly pleaded as it appears from many case histories that sufficient, undisputed evidence was not offered to establish coverage.”). For an example of such a case, see *Fierro v. Knight Transp.*, No. EP-12-CV-00218-DCG, 2012 WL 4321304, at *2-*5 (W.D. Tex. Sept. 18, 2012).

The grant or denial of summary judgment is a more appropriate indicator of the turning of the tide in ADA discrimination lawsuits. Courts' determinations at this stage more accurately depict the relative success of the parties because ADA discrimination lawsuits rarely proceed to trial.⁴⁹ Indeed, most employment discrimination lawsuits—perhaps as many as 70% of such lawsuits—are terminated by settlement.⁵⁰ Consequently, the major bargaining position lies at the summary judgment phase of discrimination suits, when an employer moves for summary judgment. From the employer's perspective, she would rather spend her money pursuing a summary judgment ruling than settling "in order to limit other employees' incentives to sue."⁵¹ From the employee's perspective, she may be "blinded by serious emotional and financial distress," causing her to be overly optimistic about her likelihood of success until summary judgment is denied.⁵² Even though a denial of summary judgment does not technically terminate a case, once (and if) the court denies summary judgment, the employer will "become serious" about settling, and thus as a practical matter, the case will be terminated in the typical employment discrimination suit.⁵³

1. Plaintiffs Are More Likely to Survive Summary Judgment in the Post-Amendments Act Era: Statistics

The newly discovered empirical data from the Amendments Act study shows that plaintiffs have experienced greater success at the summary judgment stage under the Amendments Act than they previously had under the original ADA. In their 2000–2001 study, Berger, Finkelstein, and Cheung analyzed the rate at which plaintiffs bringing various discrimination claims were able to survive their employers' motions for summary judgment in the federal district courts of the Second Circuit.⁵⁴

49. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 276-77 (2000).

50. Clermont & Schwab, *supra* note 47, at 440.

51. Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA. J. LAB. & EMP. L. 735, 740 (2004).

52. Berger, Finkelstein & Cheung, *supra* note 45, at 46, 48.

53. *Id.* at 48.

54. *Id.* at 50-52. Berger, Finkelstein, and Cheung compiled their data using two methods: by conducting a Westlaw search using key terms associated with employment discrimination suits and by compiling a list of all filings coded under the heading ("Civil rights: jobs") from the PACER online database. *Id.* at 51-53. The Berger study only includes cases from the Second Circuit, whereas the Amendments Act study contains cases from all

Cases involving pro se plaintiffs were excluded from the statistics, owing to the substantial distorting effect pro se cases had on the sample.⁵⁵ Additionally, data collected from Westlaw was adjusted for “publication bias,” which refers to the tendency of courts to issue a higher number of written opinions for decisions granting summary judgment than those denying summary judgment.⁵⁶ With respect to disability claims brought under the ADA, the Berger study found that employees survived summary judgment only 24.3% of the time (or in nine out of thirty-seven cases) in all of the district courts of the Second Circuit combined.⁵⁷ In fact, ADA plaintiffs had the lowest summary judgment survival rate compared to all other employment discrimination plaintiffs analyzed in the Berger study.⁵⁸

Notably, the summary judgment denial percentage would have been even lower if the sample of district courts did not include New York.⁵⁹ Because New York’s state disability laws defined “disability” more broadly than the original ADA, a discernible number of suits survived summary judgment merely because plaintiffs’ pendent state claims defeated summary

federal jurisdictions. Because the data for the Berger study and Amendments Act study come from different courts, the comparison of the two surveys is admittedly somewhat of an “apples and oranges” comparison. However, because the Amendments Act study contains opinions from a wide array of courts—thereby diminishing the influence of the occasional “pro-employer” or “pro-employee” jurisdiction—I believe any distorting effect from using cases outside of the Second Circuit in the Amendments Act study is minimal. This conclusion is bolstered by the fact that the Second Circuit has been described as having both “pro-employee” and “pro-employer” tendencies by different commentators. See Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHALL L. REV. 301, 343 (1986) (pro-employee); Brandy S. Parrish, Note, *Walking an Evidentiary Tightrope: the Aftermath of Reeves v. Sanderson Plumbing Products, Inc.*, 31 U. MEM. L. REV. 677, 707 (2001) (pro-employer).

55. *Id.* at 56, 57 tbl. 3.

56. *Id.* at 52; see also Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133, 1146 (1990) (“[I]t is almost certainly the case that rulings that dispose of a case are more likely to be written and more likely to be published.”). Because the data collected for this Comment was also gathered from an online database (WestlawNext), and in order to maintain an accurate comparison, only the results obtained by the Berger study before this “adjustment” will be used for comparison to the Amendments Act results shown in Table 1, *infra*.

57. Berger, Finkelstein & Cheung, *supra* note 45, at 59, 60 tbl. 5. Even after the adjustment for publication bias, the study revealed that employees survived summary judgment in only 32.1% of the relevant ADA cases. *Id.*

58. *Id.* at 60 tbl. 5 (compiling data for race, sex, and age discrimination claims, as well as retaliation claims).

59. *Id.* at 62-63.

judgment, even though their federal ADA claims did not survive.⁶⁰ Also, an even lower percentage of summary judgment denials likely existed for the near decade following the study,⁶¹ owing to the fact that the Berger study preceded the Supreme Court's major disability-narrowing opinions: *Sutton v. United Air Lines, Inc.*,⁶² and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁶³

In order to achieve a parallel comparison to the Berger study, to the fullest extent possible I used the same methodology utilized in the Berger study to collect summary judgment statistics in the Amendments Act study.⁶⁴ The results of the Amendments Act study are depicted in Table 1 below, revealing that employees survived their employers' summary judgment motions at a rate of 39.2%,⁶⁵ representing an increase of 14.9% from the summary judgment survival rate plaintiffs achieved under the ADA in 2000–2001.⁶⁶

60. *Id.*; see also N.Y. EXEC. LAW § 292(21) (McKinney 2012) (effective Jan. 1, 1998). The data coding process employed by Berger, Finkelstein, and Cheung regarded plaintiffs as surviving summary judgment so long as one of their claims survived the summary judgment phase, even if summary judgment was granted to the employer on the federal ADA claim. See Berger, Finkelstein, & Cheung, *supra* note 45, at 51.

61. See Allbright, *supra* note 47, at 342 tbl. 4 (showing the years 2003–2009 had some of the lowest ADA plaintiff win percentages in the history of the ADA). But see Jones, *supra* note 43, at 692 (noting that ADA plaintiffs actually fared better when appealing to the circuit courts in the early wake of *Toyota* and *Sutton* than they had previously).

62. 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(2)–(3), 122 Stat. 3553, 3554.

63. 534 U.S. 184, 200–02 (2002), *superseded by statute*, ADA Amendments Act of 2008, § 2(b)(4), 122 Stat. at 3554.

64. To this end, I used a broad key-term search in WestlawNext to yield as many Title I discrimination and failure to accommodate cases as possible. Collecting cases from January 1, 2012, through January 15, 2013, I searched all federal district and circuit courts, using the search phrase “(ADAAA & disability & discrimination).” Then, I individually analyzed each opinion to ensure that the Amendments Act (not the original ADA) applied to the lawsuit. All opinions other than summary judgment dispositions were screened from the sample. And, like in the Berger study, all pro se cases were excluded from the sample. Summary judgment was only considered denied where at least one of the plaintiff's federal Amendments Act claims (either alleging discriminatory conduct or a failure to accommodate) survived summary judgment; the disposition of any pendent state claims was disregarded.

65. See *infra* Table 1.

66. See Berger, Finkelstein, & Cheung, *supra* note 45, at 60 tbl. 5. Even assuming that the WestlawNext search conducted for this Comment contained no publication bias, there would still be an increase in the rate in which employees survive summary judgment under the ADA. That is, if every written opinion in every federal court was available on WestlawNext and found through this author's search (an inconceivable proposition, given

Table 1: Summary Judgment Statistics for Employers' Motions for Summary Judgment in Amendments Act Cases, Jan. 1, 2012–Jan. 15, 2013, All Federal Courts

Summary Judgment Granted

31/51 (60.8%)⁶⁷

Summary Judgment Denied

20/51 (39.2%)⁶⁸

the fact that not all opinions are published on Westlaw), the rate of summary judgment denial would still be 7.1% higher for Amendments Act cases (39.2%) than for the adjusted summary judgment survival rate under the Berger study (32.1%). *See id.*

67. *See* Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012); Wurzel v. Whirlpool Corp., 482 F. App'x 1, 2 (6th Cir. 2012); Wirey v. Richland Cmty. Coll., 913 F. Supp. 2d 633, 635 (C.D. Ill. 2012); Mashek v. Soo Line R.R. Co., No. 11–487 (MJD/JJG), 2012 WL 6552795, at *1 (D. Minn. Dec. 14, 2012); Johnson v. City of Murray, 909 F. Supp. 2d 1265, 1273 (D. Utah 2012); Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1255 (D. Colo. 2012); Walker v. Venetian Casino Resort, LLC, No. 02:10–CV–00195–LRH–VCF, 2012 WL 4794149, at *16 (D. Nev. Oct. 9, 2012); Fossesigurani v. City of Bridgeport Fire Dep't, No. 3:11–cv–752 (VLB), 2012 WL 4512772, at *1 (D. Conn. Oct. 1, 2012); Torres v. Bremen Castings, Inc., No. 3:11–CV–035, 2012 WL 4498876, at *1 (N.D. Ind. Sept. 28, 2012); Karr v. Napolitano, No. C 11–02207 LB, 2012 WL 4462919, at *1 (N.D. Cal. Sept. 25, 2012); Love v. Baptist Mem'l Hosp.–N. Miss., Inc., No. 2:10CV176–SA–JMV, 2012 WL 4465569, at *1 (N.D. Miss. Sept. 25, 2012); Mota v. Aaron's Sales & Lease Ownership, No. 11–4298, 2012 WL 3815332, at *1 (E.D. Pa. Sept. 4, 2012); Howze v. Jefferson Cnty. Comm., for Econ. Opportunity, No. 2:11–CV–52–VEH, 2012 WL 3775871, at *1 (N.D. Ala. Aug. 28, 2012); Howard v. Steris Corp., 886 F. Supp. 2d 1279, 1283 (M.D. Ala. 2012); Poper v. SCA Ams., Inc., No. 10–3201, 2012 WL 3288111, at *1 (E.D. Pa. Aug. 13, 2012); Beatty v. Hudco Indus. Prods., Inc., 881 F. Supp. 2d 1344, 1356 (N.D. Ala. 2012); Jenkins v. Med. Labs. of E. Iowa, Inc., 880 F. Supp. 2d 946, 966 (N.D. Iowa 2012); Lohf v. Great Plains Mfg., Inc., No. 10–1177–RDR, 2012 WL 2568170, at *9 (D. Kan. July 2, 2012); Bar-Meir v. Univ. of Minn., No. 10–936 (SRN/JJK), 2012 WL 2402849, at *6 (D. Minn. June 26, 2012); Robinson v. Roosevelt Union Free Sch. Dist., No. 10–CV–834 (SJF)(ETB), 2012 WL 1980410, at *1 (E.D.N.Y. May 31, 2012); Ratcliff v. Mountain Brook Bd. of Educ., No. 2:11–CV–0029–KOB, 2012 WL 1884898, at *1 (N.D. Ala. May 22, 2012); Diaz v. City of Phila., No. 11–671, 2012 WL 1657866, at *1 (E.D. Pa. May 10, 2012); Lloyd v. Hous. Auth. of Montgomery, Ala., 857 F. Supp. 2d 1252, 1257 (M.D. Ala. 2012); Curley v. City of N. Las Vegas, No. 2:09–CV–01071–KJD–VCF, 2012 WL 1439060, at *8 (D. Nev. Apr. 25, 2012); Sechler v. Modular Space Corp., No. 4:10–CV–5177, 2012 WL 1355586, at *1 (S.D. Tex. Apr. 18, 2012); Ryan v. Columbus Reg'l Healthcare Sys., Inc., No. 7:10–CV–234–BR, 2012 WL 1230234, at *10 (E.D.N.C. Apr. 12, 2012); McDaniel v. Piedmont Indep. Sch. Dist. No. 22, No. CIV–11–373–M, 2012 WL 1227154, at *6 (W.D. Okla. Apr. 11, 2012); De La Cruz v. Children's Trust of Miami-Dade Cnty., 843 F. Supp. 2d 1273, 1276 (S.D. Fla. 2012); Sickels v. Cent. Nine Career Ctr., No. 1:10–cv–00479–SEB–DKL, 2012 WL 266945, at *1 (S.D. Ind. Jan. 30, 2012); Holland v. Shinseki, No. 3:10–CV–0908–B, 2012 WL 162333, at *1 (N.D. Tex. Jan. 18, 2012); Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 655 (W.D. Ky. 2012).

Had the Berger study excluded all pendent state claims (as the Amendments Act study did), the results would show an even greater percentage increase than 14.9% in summary judgment denial.⁶⁹ Regardless, any progress for disabled employees who have suffered employment discrimination marks a significant advancement for plaintiffs' rights, especially given the prohibitively low plaintiff success rates revealed by the Berger study.⁷⁰

The fact that plaintiffs filing suit under the ADA can survive summary judgment motions at a higher rate after the Amendments Act should not come as a shock to those familiar with the Amendment. In fact, one legal scholar accurately predicted that "[t]he primary effect of the [Amendments Act] will be to remove existence of disability as a robust summary judgment issue for employers."⁷¹ A necessary consequence of this effect is an increase in plaintiffs' bargaining power during settlement negotiations,⁷² which increases costs to employers. Regardless of increasing costs, the Amendments Act should be lauded for lowering the obstacle of summary

68. *See* EEOC v. Ford Motor Co., No. 12-2484, 2014 WL 1584674, at *1 (6th Cir. Apr. 22, 2014), *rev'g* 2012 WL 3945540 (E.D. Mich. Sept. 10, 2012); *Mercer v. Arbor E & T, LLC*, No. 11-cv-3600, 2013 WL 164107, at *20 (S.D. Tex. Jan. 15, 2013); *Howard v. Pa. Dep't of Pub. Welfare*, No. 11-1938, 2013 WL 102662, at *15 (E.D. Pa. Jan. 9, 2013); *Shelton v. City of Cincinnati*, No. 1:11-cv-381, 2012 WL 5385601, at *24 (S.D. Ohio Nov. 1, 2012); *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1382 (N.D. Ga. 2012); *Harty v. City of Sanford*, No. 6:11-cv-1041-Orl-31KRS, 2012 WL 3243282, at *1 (M.D. Fla. Aug. 8, 2012); *Socoloski v. Sears Holding Corp.*, No. 11-3508, 2012 WL 3155523, at *1 (E.D. Pa. Aug. 3, 2012); *Holmes v. Cutchall Mgmt. Kan. LLC*, No. 10-2672-EFM, 2012 WL 3071056, at *1 (D. Kan. July 26, 2012); *Dentice v. Farmers Ins. Exch.*, No. 10-C-113, 2012 WL 2504046, at *21 (E.D. Wis. June 28, 2012); *Schrack v. R+L Carriers, Inc.*, No. 1:10cv603, 2012 WL 2309365, at *14 (S.D. Ohio June 18, 2012); *Pearce-Mato v. Shinseki*, No. 2:10-cv-1029, 2012 WL 2116533, at *1 (W.D. Pa. June 11, 2012); *Wright v. Stark Truss Co.*, No. 2:10-2427-RMG-BM, 2012 WL 3029638, at *14 (D.S.C. May 10, 2012); *Snyder v. Livingston*, No. 1:11-CV-77, 2012 WL 1493863, at *17 (N.D. Ind. Apr. 27, 2012); *McNamee v. Freeman Decorating Servs., Inc.*, No. 2:10-CV-01294-GMN-PAL, 2012 WL 1142710, at *6 (D. Nev. Apr. 4, 2012); *Mills v. Temple Univ.*, 869 F. Supp. 2d 609, 629 (E.D. Pa. 2012); *Fleck v. Wilmac Corp.*, No. 10-05562, 2012 WL 1033472, at *11 (E.D. Pa. Mar. 27, 2012); *Barlow v. Walgreen Co.*, No. 8:11-cv-71-T-30EAJ, 2012 WL 868807, at *7 (M.D. Fla. Mar. 14, 2012); *Kravits v. Shinseki*, No. 10-861, 2012 WL 604169, at *1 (W.D. Pa. Feb. 24, 2012); *Wells v. Cincinnati Children's Hosp. Med. Ctr.*, 860 F. Supp. 2d 469, 489 (S.D. Ohio 2012); *Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 1007-08 (W.D. Tex. 2012).

69. *See* Berger, Finkelstein, & Cheung, *supra* note 45, at 62-63.

70. *Id.* at 59, 60 tbl. 5.

71. Jones, *supra* note 43, at 693.

72. *See supra* text accompanying notes 51-52.

judgment for individuals who have impairments substantially limiting a major life activity but would previously have been unable to bring a successful claim under the ADA.

The pendulum seems to have swung back too far, however, because many courts assume a disability exists when faced with somewhat close calls under the Amendments Act.⁷³ This skips a vital step in the analysis—the threshold requirement for the application of the ADA.⁷⁴ Moreover, upon analyzing the bases on which courts are granting summary judgment under the Amendments Act, it seems that the plaintiff's qualified individual burden under the ADA has overcompensated for the more lenient standard of proving an ADA disability.

2. The Amplified Role of the Qualified Individual Determination

Whereas a plaintiff's lack of disability served as the primary basis for granting summary judgment under the ADA,⁷⁵ the Amendments Act study reveals that federal courts granted summary judgment based at least in part on the determination that the plaintiff was not a qualified individual in 32.3% (10/31) of the opinions granting summary judgment.⁷⁶ Furthermore, if the pro se cases would not have been excluded from the study, the qualified individual analysis would have been a major factor in granting summary judgment for an astounding 38.2% (13/34) of the cases where

73. See *infra* notes 138-141 and accompanying text.

74. See 29 C.F.R. § 1630.2(j)(1)(iv) (2014) (“The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.”); see also 42 U.S.C. § 12112(a) (2012) (stating that no employer “shall discriminate against a qualified individual on the basis of *disability*”) (emphasis added)).

75. See Amy L. Allbright, *2010 Employment Decisions Under the ADA Titles I and V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394, 396 (2011).

76. See *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012); *Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 11 (6th Cir. 2012); *Mashek v. Soo Line R.R. Co.*, No. 11–487 (MJD/JJG), 2012 WL 6552795, at *7 (D. Minn. Dec. 14, 2012); *Walker v. Venetian Casino Resort, LLC*, No. 02:10–CV–00195–LRH–VCF, 2012 WL 4794149, at *15 (D. Nev. Oct. 9, 2012); *Torres v. Bremen Castings, Inc.*, No. 3:11–CV–035, 2012 WL 4498876, at *11–*12 (N.D. Ind. Sept. 28, 2012); *Diaz v. City of Phila.*, No. 11–671, 2012 WL 1657866, at *9, *14 (E.D. Pa. May 10, 2012); *Lloyd v. Hous. Auth. of Montgomery, Ala.*, 857 F. Supp. 2d 1252, 1264, 1269 (M.D. Ala. 2012); *McDaniel v. Piedmont Indep. Sch. Dist.* No. 22, No. CIV–11–373–M, 2012 WL 1227154, at *4, *6 (W.D. Okla. Apr. 11, 2012); *De La Cruz v. Children's Trust of Miami-Dade Cnty.*, 843 F. Supp. 2d 1273, 1280–81 (S.D. Fla. 2012); *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 662 (W.D. Ky. 2012).

summary judgment was granted to the employer.⁷⁷ Even in many of the opinions denying summary judgment to employers, the qualified individual determination lay at the heart of the courts' decisions.⁷⁸ This proves that the qualified individual determination has become the major battleground in disability discrimination suits.

In fact, *Mashek v. Soo Line R.R. Co.* shows that at least one court applying the Amendments Act has focused its entire analysis on the qualified individual decision, completely ignoring the other two prima facie elements.⁷⁹ In *Mashek*, the district court in Minnesota stated that because the employee could not establish he was a qualified individual for his position, the court "need not address" the other prima facie elements.⁸⁰ This type of cursory review seems to be more consistent with courts' treatment of the *disability* determination pre-Amendments Act.⁸¹ As a consequence, employees bringing disability claims, especially pro se plaintiffs, may be particularly vulnerable to summary judgment motions alleging the employee is not a qualified individual under the ADA.

3. Courts Are Still Granting Summary Judgment Because No Disability Exists

Employees with some type of impairment do not automatically satisfy the disability prima facie element just because the definition of a disabled person has been expanded under the Amendments Act.⁸² In fact, some plaintiffs have failed to prove a disability even under the more lenient

77. See *Ivey v. First Quality Retail Serv.*, 490 F. App'x 281, 286 (11th Cir. 2012); *Zurenda v. Cardiology Assocs., P.C.*, No. 3:10-CV-0882, 2012 WL 1801740, at *9 (N.D.N.Y. May 16, 2012); *Hardin v. Christus Health Se. Tex. St. Elizabeth*, No. 1:10-CV-596, 2012 WL 760642, at *5 (E.D. Tex. Jan. 6, 2012).

78. See, e.g., *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1377-79 (N.D. Ga. 2012); *Barlow v. Walgreen Co.*, No. 8:11-cv-71-T-30EAJ, 2012 WL 868807, at *5-*6 (M.D. Fla. Mar. 14, 2012).

79. 2012 WL 6552795, at *6-*7.

80. *Id.* at *6.

81. Although the court in *Mashek* may have ignored the other two prima facie elements in order to conserve judicial resources, this type of analysis would have been unfathomable prior to the adoption of the Amendments Act. Before the Amendment, courts were much more likely to grant summary judgment based on the employee's lack of a disability, ignoring the other prima facie elements. See Albright, *supra* note 75, at 396.

82. See, e.g., *Poper v. SCA Ams., Inc.*, No. 10-3201, 2012 WL 3288111, at *7-*9 (E.D. Pa. Aug. 13, 2012) (finding temporary back pain was not a disability under the Amendments Act); *Ratcliff v. Mountain Brook Bd. of Educ.*, No. 2:11-CV-0029-KOB, 2012 WL 1884898, at *3 (N.D. Ala. May 22, 2012) (finding high blood pressure and occasional "ill and woozy feelings" did not make the plaintiff disabled under the Amendments Act).

Amendments Act standards. The Amendments Act study shows that 22.6% (7/31) of the time, courts relied solely on the employee's lack of an ADA disability in granting summary judgment to the employer.⁸³ While over 20% represents a substantial percentage, this figure signifies a major decline from pre-Amendments Act case law, when a large majority of ADA claims brought were terminated at the summary judgment stage due to plaintiffs' failure to establish a disability.⁸⁴ Because the Supreme Court prohibitively construed the definition of a disability pre-Amendments Act, many deserving employees were effectively prevented from bringing their disability claims.⁸⁵ In the legislative history of the Amendments Act, the House Committee on Education and Labor explained the abuse of the summary judgment device concerning the plaintiff's failure to establish he was disabled under the original ADA:

Too often cases have turned solely on the question of whether the plaintiff is an individual with a disability; too rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.⁸⁶

Perhaps the frequency of cases turning solely on the question of whether the plaintiff is disabled has been reduced to an appropriate level under the Amendments Act. On the other hand, having a "disability" under the new ADA may have lost all of its common sense meaning.⁸⁷ Regardless, the Amendments Act study shows that although courts have granted summary judgment to employers less often based on the employee's lack of a disability, courts are still finding a lack of a disability in some cases.

83. See *Johnson v. City of Murray*, 909 F. Supp. 2d 1265, 1295 (D. Utah 2012); *Love v. Baptist Mem'l Hosp.-N. Miss., Inc.*, No. 2:10CV176-SA-JMV, 2012 WL 4465569, at *4 (N.D. Miss. Sept. 25, 2012); *Mota v. Aaron's Sales & Lease Ownership*, No. 11-4298, 2012 WL 3815332, at *5 (E.D. Pa. Sept. 4, 2012); *Poper*, 2012 WL 3288111, at *9; *Jenkins v. Med. Labs. of E. Iowa, Inc.*, 880 F. Supp. 2d 946, 960 (N.D. Iowa 2012); *Robinson v. Roosevelt Union Free Sch. Dist.*, No. 10-CV-834 (SJF)(ETB), 2012 WL 1980410, at *7 (E.D.N.Y. May 31, 2012); *Ratcliff*, 2012 WL 1884898, at *3.

84. See Allbright, *supra* note 75, at 396.

85. See *infra* text accompanying note 196.

86. H.R. REP. NO. 110-730(I), at 8 (2008).

87. See Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 61 (2011).

B. The Practical Effects of Focusing on Job Qualifications Rather than Whether an Individual Is Disabled

In summary dispositions under the Amendments Act, the role of the qualified individual determination seems to have evolved naturally. The primary purpose of the Amendments Act was to make it easier for employees to show they have a disability within the meaning of the ADA; so intuitively, the disability determination will no longer serve as such a strong weapon for employers. The third prima facie element, requiring a plaintiff to show that she was discriminated against “on the basis” of her disability,⁸⁸ is also not a source employers can consistently rely upon for achieving victory at the summary judgment stage. Because the causation requirement is a highly factual determination, often based on conflicting testimonies, this element is rarely an appropriate one for summary judgment.⁸⁹

As a result, the qualified individual determination is the most viable basis for employers to win at the summary judgment stage under the Amendments Act. Employers and human resource departments seem to be slightly ahead of the curve compared to legal commentators in recognizing this fact. One human resources article has advised its readers, “[Y]our main defense will be that despite reasonable accommodations, a disabled employee still couldn’t perform the essential job functions.”⁹⁰ Furthermore, that article provided the following advice concerning what employers should do to protect themselves from potential ADA lawsuits: “First, update your job descriptions. Determine ahead of time which job functions are essential—as opposed to marginal. If you have job descriptions, dust them off and review them closely to make sure they accurately set forth the position’s essential functions.”⁹¹ This advice happens to be quite consistent with current EEOC regulations, which state that essential functions are the “fundamental job duties of the employment position the individual with a disability holds or desires . . . [and do] not include the marginal functions of the position.”⁹²

88. 42 U.S.C. § 12112(a) (2012).

89. See *Fleck v. Wilmac Corp.*, No. 10–05562, 2012 WL 1033472, at *11–*12 (E.D. Pa. Mar. 27, 2012).

90. Jonathan R. Mook, *Five Steps to Protect Your Company from Claims Under New ADA*, HR HERO LINE (Sept. 9, 2010), <http://www.hrhero.com/hl/articles/2010/09/09/five-steps-to-protect-your-company-from-claims-under-new-ada/>.

91. *Id.*

92. 29 C.F.R. § 1630.2(n)(1) (2014).

To guide the qualified individual analysis, EEOC regulations list several concrete factors courts may consider in determining whether a function is essential to the job, including

[t]he employer's judgment as to which functions are essential; [w]ritten job descriptions prepared before advertising or interviewing applicants for the job; [t]he amount of time spent on the job performing the function; [t]he consequences of not requiring the incumbent to perform the function; [t]he terms of a collective bargaining agreement; [t]he work experience of past incumbents in the job; and/or [t]he current work experience of incumbents in similar jobs.⁹³

Following the EEOC's mandates, employers will now have to determine which functions are truly essential, rather than marginal, for each position within their companies. But, because of the guidance provided by the EEOC, this will not be a blind undertaking. Another benefit of the guidance provided by the EEOC regulations will be the predictability and consistency it may create among the federal courts. Because courts have to apply the same limited number of factors to each case, a clear spectrum of what does and does not constitute an essential function will likely emerge. Thus, the shift in focus to the qualified individual analysis will likely bring many advantages. But it may include negative consequences as well.

C. Has Congress Created a Perverse Incentive for Employers?

Although yet unrealized, the Amendments Act might have the unintended effect of creating an incentive for employers to inflate job descriptions to bar disabled individuals from positions. Because many employers know that any impaired individuals they hire will have a stronger chance of successfully suing under the Amendments Act, they might distort the physical and mental demands of a job such that individuals with impairments cannot meet the threshold. In doing so, such employers could purport to be justified for refusing to hire an individual with a potential disability under the Amendments Act, so long as that individual fails to meet one of the heightened requirements for the position.⁹⁴

93. *Id.* § 1630.2(n)(3)(i)-(vii).

94. *See* 42 U.S.C. § 12112(a) (2012) (stating that only *qualified* individuals are protected under the Amendments Act).

In theory, if discriminatory intent motivates employers to raise their job qualifications, they would be liable for employment discrimination.⁹⁵ In reality, though, even if employers intentionally screen out qualified job applicants with disabilities, it is unlikely that disabled employees rejected in the application process will bring ADA claims for discrimination in the hiring process.⁹⁶ Victims of hiring discrimination may refuse to bring discrimination suits for a litany of reasons. They may not know of their rights under the ADA.⁹⁷ Even if they are aware of those protections, they “may find the remedy insufficient, the prospect of success slight, the advent of success long-delayed, or the enforcement procedures complex and intimidating.”⁹⁸ Moreover, with the looming need to find employment, these victims may “simply wish to forget [their] pain and get on with [their] lives.”⁹⁹ In contrast, most current employees have invested their own human capital into skills specific to a position and are, therefore, more prone to sue when they believe they have been discriminated against.¹⁰⁰ For these reasons, the number of claims brought against employers for failure to hire is largely overshadowed by the number of claims brought by current or former employees.¹⁰¹

Therefore, when faced with the costs of lawsuits for hiring discrimination (which have proven slight) and the potential costs for future

95. *Id.* (stating employers will be liable for discrimination with regard to job application procedures, among other things).

96. See Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 253 (1995).

97. See *id.*

98. *Id.*

99. *Id.* at 254; see also George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL’Y & L. 43, 75-76 (1993) (“[F]ew plaintiffs would go to the trouble and expense of bringing a claim for discrimination if they could easily seek an equally attractive job with another employer.”).

100. Rutherglen, *supra* note 99, at 75-76.

101. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1024 (1991) (noting the greater probability of a plaintiff bringing a wrongful termination claim than a failure to hire claim); Munroe, *supra* note 96, at 254; Rutherglen, *supra* note 99, at 75 & n.113 (citing a study finding that, out of sixty-four cases in which a plaintiff brought an employment discrimination claim, only one of those cases was brought by a plaintiff who applied for a job and was rejected); William G. Somerville III, *Avoiding Lawsuits for Employment Discrimination*, 20 AM. J. TRIAL ADVOC. 277, 279 (1997) (“Most employment discrimination suits are brought by current and former employees, not by rejected applicants.”).

discrimination suits (which could be great),¹⁰² it seems likely that employers will typically choose to bear the costs of the former. In this light, Congress may have won the battle in passing the Amendments Act, but there is a chance it will lose the war. Any hindrance to achieving “equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals” would be a major shortcoming in fulfilling the goals of the Amendments Act.¹⁰³ Accordingly, drafters of further revisions of the ADA and EEOC regulations should bear in mind, and seek to avoid, this possibility.

IV. A Call to Align: Harmonizing the Disability Determination Under the Amendments Act with the ADA’s Original Goals

In addition to the increased importance of the qualified individual analysis, the major changes concerning who qualifies as disabled under the Amendments Act have had a drastic impact on cases applying the Act.¹⁰⁴ The broad principles of the Amendments Act have protected, and will continue to protect, an increasing number of individuals from discrimination based on their disabilities.¹⁰⁵ However, the broad purposes of the Amendments Act fundamentally clash with Congress’s retention of the key requirement that impairments must *substantially* limit major life activities in order for an individual to be classified as disabled.¹⁰⁶ The tension between these two conflicting standards has led to inconsistency and unpredictability in the courts.¹⁰⁷ Adding to the confusion, courts must

102. See Donohue & Siegelman, *supra* note 101, at 1024 n.131 (citing Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987)) (“Since firing costs are incurred in the future, whereas the costs of failure to hire are borne immediately, the former must be discounted in computing the net effect of discrimination laws.”) Depending on the likelihood that a job candidate will be terminated, there may be a “small (net) disincentive to hire [disabled people].” See *id.* at 1024.

103. 42 U.S.C. § 12101(a)(7) (2012).

104. See *supra* Part III.A.1.

105. See, e.g., *Socoloski v. Sears Holding Corp.*, No. 11–3508, 2012 WL 3155523, at *4 (E.D. Pa. Aug. 3, 2012) (denying summary judgment where evidence showed that an employee of thirty-eight years was fired due to physiological conditions that most likely would not have been covered under the original ADA).

106. 42 U.S.C. § 12102(1)(A).

107. Compare *Curley v. City of N. Las Vegas*, No. 2:09–CV–01071–KJD–VCF, 2012 WL 1439060, at *3 (D. Nev. Apr. 25, 2012) (conducting its own analysis of “substantially limiting,” rather than giving deference to the Amendments Act’s instruction that the definition of a disability is to be determined according to the broad purposes of the Amendments Act), with *Gesegnet v. J.B. Hunt Transp., Inc.*, No. 3:09–CV–828–H, 2011

sift through numerous and sometimes conflicting statutes, regulations, and guidelines when applying the Amendments Act.¹⁰⁸ Moreover, there is a lack of case law interpreting the Amendments Act and an abundance of case law interpreting the ADA.¹⁰⁹ When faced with the choice of applying broad, yet vague principles or following concrete direction from pre-Amendments Act case law, some courts have chosen the latter, despite the Act's primary goal of broadening the definition of disabled.¹¹⁰ But are these courts to blame, or is the real culprit a lack of guidance?

Not only have federal courts applying the Amendments Act come to different conclusions when faced with similar choices, but some courts have simply failed to follow the explicit directions found in regulations¹¹¹ or have applied rationales specifically rejected by the Amendments Act.¹¹² The most likely explanation for these erroneous decisions is the difficulty in navigating the scattered layout of the Amendments Act's many regulations and statutes. These decisions could also be a product of the conflicting

WL 2119248, at *4 (W.D. Ky. May 26, 2011) (assuming the plaintiff had a disability even though the court "doubt[ed] that the medical and personal evidence . . . [was] sufficient to show an actual inability to perform a basic function of life").

108. An additional complication is the fact that the statutes and regulations became effective on different dates. While courts generally agree that the Amendments Act is not retroactive, a smaller number of courts have taken the time to consider whether the EEOC regulations apply retroactively. *See, e.g.,* Allen v. SouthCrest Hosp., 455 F. App'x 827, 835 (10th Cir. 2011) (holding that the regulations are not to have retroactive effect); Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 660 (W.D. Ky. 2012) (citing EEOC v. AutoZone, Inc., 630 F.3d 635, 641 n.3 (7th Cir. 2010)) (same).

109. A search for the term "ADA" returned over 10,000 case results in WestlawNext's online database, but a search for "ADAAA" returned only 560 cases.

110. *See, e.g.,* Wurzel v. Whirlpool Corp., No. 3:09CV498, 2010 WL 1495197, at *7 n.5 (N.D. Ohio Apr. 14, 2010) (finding employee had no disability based on his Prinzmetal angina by relying on *Toyota's* instruction that "an impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation under the ADA"), *aff'd*, 482 F. App'x 1 (6th Cir. 2012).

111. *See, e.g.,* EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 695 (E.D. La. 2011) (referring incorrectly to 29 C.F.R. § 1630.2(g)(3) (2011) as stating that an individual proceeding under a failure to accommodate claim does not have to prove she has an actual disability or record of such a disability, even though the relevant regulations clearly stated otherwise).

112. *See* Zurenda v. Cardiology Assocs., P.C., No. 3:10-CV-0882, 2012 WL 1801740, at *7 (N.D.N.Y. May 16, 2012) (applying rationale from *Toyota* that, to be disabled, an impairment must significantly restrict an individual "from doing activities that are of central importance to most people's daily lives"). This reasoning was specifically rejected by the Amendments Act. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554.

standards currently existing within the statutes and regulations. To align the Amendments Act with the original goals of the ADA and provide consistent guidance for federal courts applying the Amendments Act, this Part offers a few suggestions for Congress and the EEOC regarding the disability determination under the current statutes and regulations.

A. The Ever Ambiguous Standard: The EEOC Should Provide Affirmative Guidance for Interpreting “Substantially Limits”

The majority of the EEOC’s rules of construction for interpreting when impairments substantially limit a major life activity are devoted to explaining how *not* to make that determination.¹¹³ EEOC regulations only provide affirmative guidance for making this determination in two sections of the regulations.¹¹⁴ The EEOC first provides a list of impairments that will “in virtually all cases” substantially limit a major life activity.¹¹⁵ For example, it clarifies that deafness and blindness will always constitute disabilities.¹¹⁶ Second, the regulations allow for the consideration of the condition, manner, or duration in which the individual performs the major life activity.¹¹⁷ But even though the EEOC allows courts to consider such factors while conducting their substantial limitation analysis, these tools of construction are not very helpful. For one thing, the Interpretive Guidance offers only a few examples of how to consider these three factors.¹¹⁸ Additionally, the EEOC has made clear that these three factors are only discretionary tools for courts¹¹⁹ and, therefore, “may often be *unnecessary*

113. 29 C.F.R. § 1630.2(j)(1)-(2), (5) (2014).

114. *Id.* § 1630.2(j)(3)(iii), (4)(i).

115. *Id.* § 1630.2(j)(3)(ii)-(iii).

116. *Id.*

117. *Id.* § 1630.2(j)(4)(i). This may consist of analyzing “the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.” *Id.* § 1630.2(j)(4)(ii).

118. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j)(4) (2014).

119. *See id.* (stating that these factors may be considered when appropriate). This Comment does not suggest that the condition, manner, and duration factors should be used as part of a rigid test. Rather, even when considered, these factors do not provide sufficient affirmative guidance for courts to determine whether an impairment substantially limits a major life activity.

to conduct the analysis of whether an impairment ‘substantially limits’ a major life activity.”¹²⁰

Another regulation appears to offer affirmative guidance at first glance, but a closer look at the Interpretive Guidance reveals the contrary. This regulation states that “[a]n impairment is a disability within the meaning of . . . [the ADA] if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.”¹²¹ Under the original ADA, an individual was considered substantially limited with regard to a major life activity when she was “[u]nable to perform a major life activity that the average person in the general population can perform.”¹²² The EEOC clarified that the change from the “average person” standard to the “most people” standard “is not a substantive change in the concept, but rather is intended to conform the language to the simpler and more straightforward terminology used in the legislative history to the Amendments Act.”¹²³ Because this change was not meant to substantively change the “substantially limits” analysis, it provides no affirmative guidance to courts concerning how the new definition of a disability differs from the old one under the original ADA.

The only other “guidance” given to courts is the implicit understanding that “the term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.”¹²⁴ In a similar vein, EEOC regulations clarify what is *not* required for a plaintiff to prove a substantially limiting impairment. Specifically, the relevant regulation states that an impairment “need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.”¹²⁵ But exactly what degree of functional limitation is required? Before much case law surfaced interpreting the Amendments Act, one professor realized the tension in the conflicting ideals embodied in the rules of construction and the Amendments Act’s stated purposes.¹²⁶ Professor Carol Miller, writing on the subject in 2011,

120. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,984 (Mar. 25, 2011) (codified as amended at 29 C.F.R. pt. 1630) (emphasis added).

121. 29 C.F.R. § 1630.2(j)(1)(ii) (2014).

122. *Id.* § 1630.2(j)(1)(i) (1992).

123. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(v) (2012).

124. 29 C.F.R. § 1630.2(j)(1)(iv) (2012).

125. *Id.* § 1630.2(j)(1)(ii).

126. See Miller, *supra* note 87, at 61.

accurately predicted that courts would see that despite the broad congressional purposes of the Amendments Act, the definition of a disability under the EEOC is “counterintuitive to the common sense meaning of ‘substantially limits.’”¹²⁷ In other words, “[h]ow can an impairment ‘substantially limit’ a major life activity and simultaneously ‘not significantly or severely restrict’ the same activity?”¹²⁸

In addition to Professor Miller, one district court recognized the seemingly odd construction that courts are forced to place on the word “substantially.”¹²⁹ In *Curley v. City of North Las Vegas*, the employee suffered from a hearing impairment that diminished his ability to fully recognize the words of others.¹³⁰ Even with this impairment, however, the employee could still “achieve 96% in speech recognition.”¹³¹ In ruling that the “actual disability” prong had not been satisfied under the Amendments Act, the court stated that if such a minimal amount of hearing impairment could qualify an individual as disabled, it would render the ADA’s “‘substantial’ limitation” language meaningless because “any hearing impairment could constitute a disability.”¹³² The court found this level of impairment insufficient to label the plaintiff as disabled and, accordingly, granted summary judgment to the employer.¹³³

Similarly, in *Robinson v. Roosevelt Union Free School District*, the employee failed to prove that her leg, back, and hip disabilities inhibited her in a substantial way.¹³⁴ More specifically, even though the plaintiff claimed she was “limited in her ability to . . . walk up stairs, stand for long periods of time, lift heavy objects, bend over, or engage in any physical activity,” she was unable to put forth evidence establishing the degree of her impairments.¹³⁵ The court conceded that she had established that her major life activities were impaired, but her vague claims failed to prove that her impairment *substantially* limited any legitimate major life activity.¹³⁶ Citing

127. *Id.*

128. *Id.*

129. *Curley v. City of N. Las Vegas*, No. 2:09-CV-01071-KJD-VCF, 2012 WL 1439060, at *3 (D. Nev. Apr. 25, 2012); *see also* *Allen v. SouthCrest Hosp.*, 455 F. App’x 827, 832-33 (10th Cir. 2011) (finding that the plaintiff had to “make more than a conclusory showing that she was *substantially* limited in the major life activity of caring for herself”).

130. *Curley*, 2012 WL 1439060, at *3.

131. *Id.*

132. *Id.*

133. *Id.*

134. No. 10-CV-834 (SJF)(ETB), 2012 WL 1980410, at *1 (E.D.N.Y. May 31, 2012).

135. *Id.* at *7.

136. *Id.*

a Second Circuit three-part test, which requires a plaintiff to prove “(1) that she suffers from a physical or mental impairment, which (2) limits a ‘major life activity,’ (3) ‘substantially,’” the court granted summary judgment to the employer.¹³⁷ Although this test simply reiterates the statutory definition, it correctly forces courts to separately consider the *degree* of limitation an impairment places on a major life activity—not just whether the impairment limits such an activity at all.

Just as Professor Miller predicted, courts have had difficulty reconciling the broad purposes of the Amendments Act with the materiality requirement imposed by the term “substantially” limiting.¹³⁸ More courts can be expected to reach outcomes similar to those in *Curley* and *Robinson* because the lack of direction remains when these two competing interests collide with one another. Courts will inevitably take one of two approaches when faced with a “close call” of whether the plaintiff suffers from an actual disability under the Amendments Act. Like in *Curley*, courts could adopt their own understanding of what level of impairment rises to a “substantial” limitation, thereby conducting their own weighing analysis.¹³⁹ Otherwise, they will probably follow the purpose of the Amendments Act and assume that a disability exists without extensive analysis¹⁴⁰ because the definition of disability “shall be construed in favor of broad coverage of individuals.”¹⁴¹

To avoid this problem, Professor Miller suggests, as one approach, that Congress could eliminate the “substantial” limitation wording and create a more fitting, intermediate standard for implementing the Amendments Act.¹⁴² This approach makes sense due to the fact that the phrase

137. *Id.* (citing a pre-Amendments Act test from *Weixel v. Board of Education of City of New York*, 287 F.3d 138, 147 (2d Cir. 2002), and refusing to rely upon any post-Amendments Act cases in making the disability determination).

138. See Miller, *supra* note 87, at 61.

139. See *Curley v. City of N. Las Vegas*, No. 2:09-CV-01071-KJD-VCF, 2012 WL 1439060, at *3 (D. Nev. Apr. 25, 2012) (holding that 3% whole body hearing impairment does not pass the substantial limitation threshold).

140. See, e.g., *Gesegnet v. J.B. Hunt Transp., Inc.*, No. 3:09-CV-828-H, 2011 WL 2119248, at *4 (W.D. Ky. May 26, 2011) (assuming the plaintiff had a disability even though the court “doubt[ed] that the medical and personal evidence . . . [was] sufficient to show an actual inability to perform a basic function of life.”); see also Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC’s Final Regulations and the First Court Decisions Emerge at Last*, FED. LAW., Nov.-Dec. 2011, at 49, 53-54 (listing cases where courts assume a disability but express their doubts).

141. 42 U.S.C. § 12102(4)(A) (2012).

142. Miller, *supra* note 87, at 78-79.

“*substantially* limits” no longer holds its “common sense meaning.”¹⁴³ Changing the language would also obviate the difficult task of courts having to place an individual’s impairment somewhere between two completely opposite poles. This approach, however, fails to recognize that with each major overhaul of the ADA, the possibility for confusion exponentially increases. The Amendments Act case law makes abundantly clear that courts have struggled to reconcile a historic piece of legislation (the ADA) with its even more ambitious amendment.¹⁴⁴ Hurling another major change at federal courts would only exacerbate the problem. Even Congress recognized this fact. After extensively considering whether to adopt a new standard of functional limitation under the Amendments Act, it ultimately concluded that “adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under [the] Act.”¹⁴⁵

Consequently, the EEOC may be obliged to maintain the “substantial” limitation wording, even if it is forced to graft onto it a new meaning. To create consistent results in the federal courts, though, more positive guidance must be given by the EEOC. This approach, which Professor Miller also suggested in some form, represents the most workable compromise given the circumstances.¹⁴⁶ Fortunately, affirmative guidance for such an approach already exists in a statement issued by Representatives Steny Hoyer and Jim Sensenbrenner during the legislative history of the Amendments Act. Their approach, which the EEOC should adopt, specifies that an impairment substantially limits a major life activity when it “materially restricts” a major life activity.¹⁴⁷ They explained the proper analysis of when an impairment “substantially limits” a major life activity as follows:

“Substantially limits” has been defined as “materially restricts” in order to communicate to the courts that we believe that their interpretation of “significantly limits” was stricter than we had intended. On the severity spectrum, “materially restricts” is meant to be less than “severely restricts,” and less than

143. *See id.* at 61.

144. *See supra* notes 105-112 and accompanying text.

145. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j)(1) (2014).

146. Miller, *supra* note 87, at 78.

147. 154 CONG. REC. 13,766 (2008) (joint statement of Reps. Hoyer & Sensenbrenner).

“significantly restricts,” but more serious than a moderate impairment which would be in the middle of the spectrum.¹⁴⁸

Even though this analysis was not incorporated into the final codified form of the Amendments Act, it proves that the EEOC has means to provide affirmative guidance for the disability determination, while maintaining the original “substantial” limitation language that Congress seems resolved to keep. However the EEOC chooses to amend the regulations, recent case law makes abundantly clear that merely explaining what a disability is *not* will only lead to continued misunderstandings.

B. Overly Broad “Regarded As” Coverage: “Regarded As” Individuals Should Have to Prove More Than Just an Impairment

As in the substantial limitation analysis, the degree of (perceived) limitation caused by an impairment should be a relevant factor in determining whether a disability exists under the “regarded as” prong. Under the Amendments Act, however, the individual alleging that he has been regarded as disabled need only prove that an employer discriminated against him “because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”¹⁴⁹ This is true unless the impairment is *both* transitory and minor.¹⁵⁰ Under this rule, almost any individual with some appreciable impairment (or perceived impairment) may qualify as being “regarded as” disabled.¹⁵¹ More specifically, an actual or perceived impairment does not have to limit a major life activity in any way whatsoever if the “impairment” lasts or is expected to last longer than six months.¹⁵²

Snyder v. Livingston illustrates just how far coverage under the “regarded as” prong has extended under the Amendments Act.¹⁵³ As a rare example of absolute adherence to the Amendments Act, the *Snyder* court refused to consider any pre-Amendments Act case law construing when an individual qualifies as disabled under the “regarded as” prong.¹⁵⁴ For this reason,

148. *Id.*; see also H.R. REP. NO. 110-730(I), at 9-10 (2008) (“In the range of severity of the limitation, ‘materially restricted’ is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation.”).

149. 42 U.S.C. § 12102(3)(A) (2012) (emphasis added).

150. *Id.* § 12102(3)(B).

151. See, e.g., *Snyder v. Livingston*, No. 1:11-CV-77, 2012 WL 1493863, at *6 (N.D. Ind. Apr. 27, 2012).

152. See 42 U.S.C. § 12102(3)(B).

153. See *Snyder*, 2012 WL 1493863, at *6-*8.

154. *Id.* at *7.

Snyder represents the unfiltered analysis mandated by the current regulatory scheme.¹⁵⁵ The court began its analysis by reciting the Amendments Act's broad purposes of construing the definition of disability "broadly in favor of expansive coverage" and focusing primarily on "whether discrimination has occurred, not whether the individual meets the definition of disability."¹⁵⁶ Next, it cited post-Amendments Act case law recognizing that while the original ADA required a showing of substantial limitation, the Amendments Act now encompasses a perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity."¹⁵⁷

Applying the statutes and regulations to the facts, the court found a genuine issue of fact remained with respect to whether the employer regarded the plaintiff as disabled, and it denied summary judgment.¹⁵⁸ Surprisingly, the only evidence the plaintiff offered to defeat summary judgment was a few statements made by her supervisor.¹⁵⁹ The employee claimed that during a telephone argument with her supervisor, the supervisor called her "emotionally unstable" and told her she "should get help."¹⁶⁰ The supervisor's version of the facts maintained that she only told the employee she "appeared to be on a bit of an emotional roller coaster and that no one knew how to act around her."¹⁶¹ The final support offered by the court for its decision was the Amendments Act's instruction that the court "is not supposed to engage in an extensive analysis of whether [the plaintiff] is disabled under the ADA," but instead must focus on whether discrimination occurred.¹⁶² Basically, by applying the relaxed standards for the "regarded as" prong under the Amendments Act, the court eliminated the disability requirement under the ADA.

Although financial considerations should not be the deciding factor in determining how much protection the ADA should afford, the costs of defending frivolous discrimination suits adds to the logic of adding a

155. *See supra* Part II.

156. *Snyder*, 2012 WL 1493863, at *7 (quoting 29 C.F.R. § 1630.1(c)(4) (2012)).

157. *Id.* (quoting *Becker v. Elmwood Local Sch. Dist.*, No. 3:10 CV 2487, 2012 WL 13569, at *9 (N.D. Ohio Jan. 4, 2012)). The court's analysis did not, however, mention the statutory provision stating that transitory and minor impairments cannot qualify an individual for coverage under the "regarded as" prong. *See* 42 U.S.C. § 12102(3)(B). Even if the court considered this statute, the plaintiff suffered from depression and mental problems for longer than six months, so the court's conclusion would have remained the same.

158. *Snyder*, 2012 WL 1493863, at *8.

159. *Id.*

160. *Id.* at *4.

161. *Id.*

162. *Id.* at *8 (quoting 29 C.F.R. § 1630.1(c)(4) (2012)).

materiality component for coverage under the “regarded as” prong. One author recently hypothesized that the cost of providing reasonable accommodations to comply with the newly revised ADA will have an “economically significant” impact.¹⁶³ As discussed by the EEOC in its notice of proposed regulations in 2009, the economically significant threshold is \$100 million spent by employers throughout the country.¹⁶⁴ While the EEOC originally predicted that the total economic impact of the Amendments Act would not rise to this threshold,¹⁶⁵ there exists evidence to the contrary.¹⁶⁶ Although accommodations are not required for individuals claiming only that they have been regarded as disabled, the Amendments Act could nonetheless create a huge financial burden.¹⁶⁷ This is because, with the ease of surviving summary judgment when bringing a “regarded as” claim, employers should expect to spend more to defend discrimination suits past the summary judgment stage than they had to before the Amendments Act’s effective date.¹⁶⁸

Snyder provides an example of courts construing the EEOC’s advice to “not demand extensive analysis”¹⁶⁹ into a default rule that presumes a disability exists, especially under the “regarded as” prong of disability.¹⁷⁰ This analysis is inconsistent with Congress’s goals in passing the ADA. Originally, Congress maintained that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹⁷¹ This purpose cannot be fulfilled unless courts make an individualized assessment in each disability discrimination suit. No one should be subjected to discrimination in the workplace based on a

163. Abigail Adams Kline, Note, *The Americans with Disabilities Act Amendments Act: Surpassing the “Economically Significant” Threshold*, 5 ENTREPRENEURIAL BUS. L.J. 251, 252 (2010).

164. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,433 (Sept. 23, 2009) (codified as amended at 29 C.F.R. pt. 1630).

165. *Id.*

166. *See* Kline, *supra* note 163, at 252.

167. *See id.* at 278.

168. *See, e.g.,* Saley v. Caney Fork, LLC, 886 F. Supp. 2d 837 (M.D. Tenn. 2012); *Snyder v. Livingston*, No. 1:11-CV-77, 2012 WL 1493863 (N.D. Ind. Apr. 27, 2012); *Gaus v. Norfolk S. Ry. Co.*, No. 09-1698, 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011).

169. 29 C.F.R. § 1630.1(c)(4) (2014).

170. *See supra* notes 153-162 and accompanying text.

171. 42 U.S.C. § 12101(a)(7) (2012).

disability, whether it is perceived or actual.¹⁷² However, when individuals with absolutely no disability (even as perceived) are able to reach the trial stage in a suit based on nothing more than the mere jesting of a supervisor, they are taking advantage of ADA laws designed to place disabled people on an equal footing with everyone else. In other words, these frivolous actions undermine the importance of legitimate claims brought by employees who have actually suffered disability discrimination or have been perceived as having an actual disability. Accordingly, some degree of impairment should be required for employees proceeding solely under the “regarded as” prong, though the standard should not be as stringent as the standard used in determining whether an actual disability exists.

*C. The Operation of a Major Bodily Function Is a Major Life Activity:
Congress’s Faulty Determination That a Brick Is a Wall*

Another novel feature of the Amendments Act is its treatment of the operation of major bodily functions as major life activities. The Amendments Act states that major life activities include the operation of major bodily functions and creates a nonexhaustive list of qualifying bodily functions.¹⁷³ The EEOC subsequently expanded this list and clarified that the operation of major bodily functions also “includes the operation of an individual organ within a body system.”¹⁷⁴ There seems to be no limit on which bodily functions are covered under this standard. When considering the admirable goals of the Amendments Act,¹⁷⁵ one may question whether this part of the Act is well calculated to redress the injustices caused by disability discrimination, namely “den[ying] people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.”¹⁷⁶ Adding “the operation of . . . major bodily function[s]” into the analysis is overinclusive and is a deviation from what Congress originally intended when it stated that a

172. The “regarded as” prong was “originally intended to express Congress’s understanding that ‘unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments.’” Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(l) (2014). Significantly, “mistaken beliefs” or prejudices are not implicated when the supervisor does not actually believe the employee has any type of disability (or does not treat the employee in such a way), like in *Snyder*.

173. 42 U.S.C. § 12102(2)(B).

174. 29 C.F.R. § 1630.2(i)(1)(ii).

175. 42 U.S.C. § 12101(a)(7) (including “assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals”).

176. *Id.* § 12101(a)(8).

disability exists when an impairment substantially limits a major life activity.¹⁷⁷

The functioning of some bodily systems has no bearing on whether an employee is disabled, or more specifically, whether a major life activity is substantially limited. For example, the common cold affects, among other things, the operation of the immune system. Should that mean that any person who has contracted the common cold is disabled within the meaning of the ADA? Surely not. The primary focus should be whether an impairment “substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population,”¹⁷⁸ not whether an individual is exhibiting the symptoms or side effects of his impairment. In determining that the symptoms of a person’s impairment substantially limit his major life activities, the Amendments Act “confuses the ADA’s concern for particular outcomes—‘equality of opportunity, full participation, independent living, and economic self-sufficiency’ for people with disabilities—with a concern that persons with disabilities function normally.”¹⁷⁹

Nowhere has the Amendments Act purported to protect every person with any type of impairment from discrimination in the workplace. Instead, it has sought only to protect *disabled* people from the “unfair and unnecessary discrimination and prejudice” that hinder such people from gaining equal employment opportunities with the rest of society.¹⁸⁰ Therefore, only major life activities—those that have some minimal importance to an employee’s daily activities—should be relevant in considering whether that person has a disability.

In some cases, courts have found a disability based solely on an impairment’s impact on a major bodily function, even though the impairment did not appear to substantially limit a major life activity.¹⁸¹ Such was the case in *Coker v. Enhanced Senior Living, Inc.*, where the court granted the plaintiff’s motion for partial summary judgment on the sole issue that painful lumps and an unusual discharge from her breasts qualified her as actually disabled under the Amendments Act.¹⁸² Although the plaintiff undoubtedly experienced pain, the lumps were not cancerous,

177. 42 U.S.C. § 12102(2)(A) (1994).

178. 29 C.F.R. § 1630.2(j)(1)(ii).

179. Jones, *supra* note 43, at 678-79.

180. 42 U.S.C. § 12101(a)(8) (2012).

181. See, e.g., *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1374-76 (N.D. Ga. 2012).

182. *Id.* at 1368-69.

were removed through surgery, and did not seem to limit any major life activity.¹⁸³ In other words, the plaintiff's condition did not seem to impair her ability to work or conduct any other life activity, much less "substantially limit[] [such an activity] as compared to most people in the general population."¹⁸⁴ If the Amendments Act had not included the operation of major bodily functions as a major life activity, the plaintiff in *Coker* would likely have failed to receive summary judgment on the issue of disability,¹⁸⁵ an outcome presumably inevitable under the original ADA's requirement that only the substantial limitation of major life activities qualifies an individual as disabled.¹⁸⁶

The inclusion of major bodily functions under the umbrella of major life activities is a deviation from the original conception of the ADA. Although it will increase coverage of individuals under the ADA, it does so at a cost. This approach abandons the threshold determination of disability discrimination suits, which is whether the employee is a disabled person.¹⁸⁷ The operation of major bodily functions often has no bearing on the activities that are even somewhat important to an individual's everyday life.

Otherwise, what is the significance in the original ADA's pronouncement, unaltered by the Amendments Act, that disabled people are those who have "a physical or mental impairment that substantially limits one or more *major* life activities?"¹⁸⁸ Just like in the substantial limitation analysis, the complete dilution of the common sense meaning of words like "major" and "substantial" will continue to confuse federal courts charged with implementing the Amendments Act. The coherence of the ADA's understanding of a disabled person is "of critical importance because as a threshold issue it determines whether an individual is covered by the ADA."¹⁸⁹ Therefore, the analysis should focus on activities important to an individual's daily life because those concerns will legitimately separate those who are "disabled" under the ADA and those who are not. Then, the ADA's goals of "assur[ing] equality of opportunity, full participation,

183. *See id.*

184. *Id.* at 1375 (quoting 29 C.F.R. § 1630.2(j)(1)(ii) (2012)).

185. *See id.* at 1375-76.

186. 42 U.S.C. § 12102(2)(A) (1994).

187. *See supra* note 74 and accompanying text.

188. 42 U.S.C. § 12102(1)(A) (2012) (emphasis added).

189. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(g) (2014).

independent living, and economic self-sufficiency for [disabled] individuals” will be more fully realized.¹⁹⁰

V. An Additional Hurdle Moving Forward: What Remnants of ADA Case Law Remain After the Amendments Act?

Congress explicitly stated that the Amendments Act superseded the rationales of two Supreme Court cases,¹⁹¹ *Sutton v. United Air Lines, Inc.*,¹⁹² and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.¹⁹³ Congress specifically rejected *Sutton*’s requirement that “whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures,” and its requirement that an employer must perceive an employee as substantially limited in a major life activity for the plaintiff to succeed in bringing a claim under the “regarded as” prong of disability.¹⁹⁴ The Amendments Act also rejected the Supreme Court’s following rationale in *Toyota*:

[T]he terms “substantially” and “major” . . . “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”¹⁹⁵

The stated rationales employed by the Supreme Court in *Toyota* and *Sutton* were superseded because they sharply “narrowed the broad scope of protection [Congress originally] intended . . . [under] the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”¹⁹⁶

One relevant question that has not previously been posed, however, is whether the remaining portions of these Supreme Court decisions should still be cited as good law, assuming of course that the forbidden rationales are not being cited specifically. Neither the regulations nor the Interpretive

190. 42 U.S.C. § 12101(a)(7).

191. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(2)–(4), 122 Stat. 3553, 3554.

192. 527 U.S. 471 (1999), *superseded by statute*, § 2(b)(2)–(3), 122 Stat. at 3554.

193. 534 U.S. 184 (2002), *superseded by statute*, § 2(b)(4), 122 Stat. at 3554.

194. § 2(b)(2)–(3), 122 Stat. at 3554.

195. *Id.* § 2(b)(4) (quoting *Toyota*, 534 U.S. at 197, 198).

196. *Id.* § 2(a)(4).

Guidance provide an answer to this question, but several post-Amendments Act courts have cited *Sutton* or *Toyota* in opinions applying the Amendments Act.¹⁹⁷ One such case is *Mota v. Aaron's Sales & Lease Ownership*.¹⁹⁸ In this case, the district court quoted *Sutton* for its analysis of the major life activity of working: "To be substantially limited in the major life activity of working . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice."¹⁹⁹ Oddly enough, this standard from *Sutton* conforms quite well to the current Interpretive Guidance of the EEOC's regulations. Those guidelines state that "[d]emonstrating a substantial limitation in performing the unique aspects of a single . . . job is not sufficient to establish that a person is substantially limited in the major life activity of working."²⁰⁰ Because both *Sutton* and the guidelines are similar in this situation, the end result would probably have been the same regardless of which rule the court applied.

Different results have been reached by courts interpreting the continued vitality of *Toyota*'s premise that temporary disabilities do not qualify for coverage under the "actual disability" prong of the ADA.²⁰¹ In *Feldman v. Law Enforcement Associates Corp.*, the court opted to defer to the Amendments Act's guidance that the "definition of disability is to be construed 'in favor of broad coverage of individuals . . . to the maximum extent permitted' by the law."²⁰² The plaintiff survived the employer's motion for summary judgment because the court distinguished the plaintiff's impairment from the examples listed in the proposed federal regulations at the time, representing temporary conditions usually found to not substantially limit major life activities.²⁰³

In *Wurzel v. Whirlpool Corp.*, however, the district court did not even acknowledge the broad goals of the Amendments Act. Recognizing that only the principal holding of *Toyota* had been overturned, the court decided that *Toyota*'s incidental holding that "an impairment that only moderately

197. See, e.g., *Mota v. Aaron's Sales & Lease Ownership*, No. 11-4298, 2012 WL 3815332, at *4 (E.D. Pa. Sept. 4, 2012) (quoting *Sutton*, 527 U.S. at 492); *Wurzel v. Whirlpool Corp.*, No. 3:09CV498, 2010 WL 1495197, at *7 n.5 (N.D. Ohio Apr. 14, 2010) (citing *Toyota*, 534 U.S. at 199).

198. 2012 WL 3815332, at *4.

199. *Id.* (quoting *Sutton*, 527 U.S. at 492).

200. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630.2(j)(5) and (6) (2014).

201. Compare *Feldman v. Law Enforcement Assocs. Corp.*, 779 F. Supp. 2d 472, 485 (E.D.N.C. 2011), with *Wurzel*, 2010 WL 1495197, at *7 n.5.

202. 779 F. Supp. 2d at 485 (quoting 42 U.S.C. § 12102(4)(A) (2012)).

203. *Id.*

or intermittently prevents an individual from performing major life activities is not a substantial limitation under the ADA” remained good law.²⁰⁴ Therefore, the court reasoned that according to *Toyota*, the plaintiff’s sporadic angina spasms, which cause dizziness, shortness of breath, fatigue, and tightness of the chest, did not place the plaintiff under the coverage of the Amendments Act.²⁰⁵

Neither the Amendments Act nor accompanying EEOC regulations appear to forbid either of the approaches taken in these illustrative cases. Courts may defer to the broad purposes of the Amendments Act and choose to reject the incidental holdings of *Toyota*, like the court did in *Feldman*, or they may choose to retain them, like the court did in *Wurzel*. For purposes of consistency, though, courts should follow the same approach. This Comment suggests that the *Wurzel* court took the proper approach. Congress chose to only invalidate one specific holding in *Toyota* and two discrete holdings in *Sutton*,²⁰⁶ rather than to baldly state that the cases are no longer good law. So, as long as courts cite material from *Sutton* and *Toyota* that is consistent with the current statutes and federal regulations and unconnected to the standards denounced in the Amendments Act, federal courts are free to do so in their own discretion. As shown in *Mota*, because the major life activity of working analysis in *Sutton* is substantially similar to current EEOC regulations, following the Amendments Act and *Sutton* in this realm are synonymous undertakings.²⁰⁷

On a broader level, there are many remaining case law formulas and standards (entirely separate from *Sutton* and *Toyota*) that lower federal courts created as guiding principles in the analysis of the three prima facie determinations in ADA discrimination suits. One example of such a surviving principle comes from *McDaniel v. Piedmont Independent School District No. 22*.²⁰⁸ In *McDaniel*, the district court reiterated a standard created by the Tenth Circuit in 2004 concerning the qualified individual analysis and how employers determine which functions are essential to a job position.²⁰⁹ *McDaniel* made clear that the Tenth Circuit’s pre-

204. *Wurzel*, 2010 WL 1495197, at *7 n.5 (citing *Toyota*, 534 U.S. at 199).

205. *Id.* at *10.

206. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(4), 122 Stat. 3553, 3554.

207. *Mota v. Aaron’s Sales & Lease Ownership*, No. 11-4298, 2012 WL 3815332, at *4 (E.D. Pa. Sept. 4, 2012).

208. No. CIV-11-373-M, 2012 WL 1227154 (W.D. Okla. Apr. 11, 2012).

209. *Id.* at *3 (citing *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1118-20 (10th Cir. 2004)).

Amendments Act standard survived the passage of the Amendments Act, affirming that “[i]n cases arising under the ADA, [courts] do not sit as a super personnel department that second guess employers’ business judgments.”²¹⁰ Because Congress left the qualified individual analysis unchanged from its pre-Amendments Act form, there seems to be no legitimate reason for denying lower federal courts, like the one in *McDaniel*, the discretion to apply such principles as they see fit (unless, of course, they are bound by conflicting standards created by a court with binding authority).

When Congress passed the Amendments Act, it consciously reversed the trend of the Supreme Court’s narrow interpretation of the ADA.²¹¹ However, through its silence, Congress seems to have implicitly left all of the other lower federal court formulas intact. If Congress sought to eliminate all of this case law interpreting the ADA, it would have done so. But because it chose to forgo this opportunity, the most logical explanation is that federal courts are still bound by all case law under the original ADA, so long as the standards used are consistent with the principles of the Amendments Act and the current statutes and regulations. This presents a high degree of latitude for judges in the lower federal courts. In light of Congress’s focus on the disability determination, standards previously adopted by courts in handling the qualified individual, direct threat, and causation doctrines, just to name a few, will most likely continue in their previous forms since their analyses are somewhat removed from the disability determination. The next few years will reveal which standards are consistent with the spirit of the Amendments Act and federal judges’ sense of justice in administering the Act.

VI. Conclusion

The Amendments Act served as a much needed piece of legislation to help correct the inequities that disabled workers have historically faced in the workplace. Although inherent tension exists within the Amendments Act’s purposes and the existing statutory language, the new system substantially lessens the nearly insurmountable standards created by federal courts under the original ADA.

As the survey of cases in the Amendments Act study reveals, summary judgment is granted less often under the Amendments Act than under the original ADA, allowing courts to consider the other elements of a plaintiff’s

210. *Id.* (quoting *Mason*, 357 F.3d at 1122).

211. *See* § 2(b)(2)-(4), 122 Stat. at 3554.

prima facie claim. Moreover, the statistics indicate that the qualified individual determination is now the most prevalent basis on which summary judgment is granted. Consequently, written job requirements will play an ever-increasing role in employment discrimination suits. In addition, the EEOC should be aware of the potential barriers to employment that could be erected as a result of the increased importance of written job requirements.

In some ways, the Amendments Act regulations implemented by the EEOC have maintained standards that sharply conflict with the ADA's originally stated purposes. Especially with regard to the current guidance for making the disability determination, courts are left with two polar opposites from which to choose: following established precedent under the ADA versus attempting to comply with the broad, unspecified goals of the Amendments Act. Additionally, the lack of a materiality requirement for employees pursuing a claim under the "regarded as" prong and the inclusion of the operation of major bodily functions as major life activities are inconsistent with the original ADA's notion of a "disabled" person.

Until something is done to clarify which analysis courts should use to determine whether an impairment "substantially limits" a major life activity, there will be a lack of uniformity among the federal courts. Because Congress has already spent considerable time and effort to amend the ADA once, the EEOC is the most likely source for any changes in the implementation of the Amendments Act in the near future—assuming the Supreme Court refrains from stepping in again. The EEOC has the most flexibility and has already updated the accompanying federal regulations and Interpretive Guidance numerous times. Thus, EEOC regulations should retain the "substantial limitation" requirement in order to avoid another search for the meaning of a different unspecified term. Congress purposefully chose that phrase when it adopted the ADA. To continue this concept while implementing the broad goals of the Amendments Act, the EEOC needs to offer courts affirmative guidance for conducting the disability analysis. This can be achieved through the adoption of the "materially restricting" analysis suggested by Representatives Hoyer and Sensenbrenner in the legislative history of the Amendments Act.

Most notably, the Amendments Act has substantially lessened the barrier to employees proving they are disabled under the ADA. While the limited case law has shown a glimpse of the Amendments Act's effect, only time will tell whether its benefits ultimately outweigh its costs.

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